Office-Supreme Court, U.S.
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FEB 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1115

Supreme Court of the United States

October Term, 1982

ROBERT J. KONDRAT,
Petitioner,

vs.

CITY OF WILLOUGHBY HILLS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ABRAHAM CANTOR, *Counsel of Record*
BYRON AND CANTOR
Suite 330
36100 Euclid Avenue
Willoughby, Ohio 44094
Telephone: (216) 951-2303
Attorney for Respondent

ROBERT J. KONDRAT, *pro se*
29121 Chardon Road
Willoughby Hills, Ohio 44092
Telephone: (216) 944-0140
Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

(1) Whether the claimed discriminatory enforcement of a municipal ordinance prohibiting the establishment of a nuisance constitutes a denial of the equal protection clause to a property owner who claims his property values have been lowered.

(2) Whether an administrative judge who in his former elected position as a county prosecutor was involved in Petitioner's indictment causes the assignment of a case for trial to an out-of-county judge constitutes a denial of due process of law.

(3) When a non-indigent Plaintiff in a civil case claims he cannot obtain "competent" legal counsel to represent his interests, is he denied due process of law?

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OPINIONS BELOW

The Ohio Supreme Court in Case No. 82-1415 on November 17, 1982, *sua sponte,* dismissed Petitioner's appeal for the reason that no substantial constitutional question existed.

On August 30, 1982, the Eleventh District Court of Appeals of Ohio in Case No. 9-069 affirmed the summary judgment granted by the Lake County Common Pleas Court on January 27, 1982 in Case No. 80-CIV-1263.

JURISDICTIONAL STATEMENT

Petitioner filed a Petition for Writ of Certiorari on January 3, 1983, pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No constitutional issue was presented to the trial court. In the State Court of Appeals, Petitioner argued that the Fourteenth Amendment was impinged upon. Petitioner now for the first time argues a Sixth Amendment claim.

STATEMENT OF THE CASE

Petitioner Robert J. Kondrat filed a *pro se* Complaint against the City of Willoughby Hills, Ohio alleging that the City had failed to enforce Willoughby Hills Codified Ordinance 1337.02 which prohibits public nuisances. Mr. Kondrat claimed that the City had unlawfully refused to enforce the Ordinance by allowing the operation of a junk yard on residentially zoned property and as a result of the City's failure to enforce the Ordinance, the value of his real estate had been lowered. The case was assigned to the Honorable John M. Parks for trial. An Answer was filed on behalf of the City.

The case at bar was transferred by the Trial Judge, to the Administrative Judge, Judge Paul H. Mitrovich, for reassignment. The Administrative Judge assigned the case to the Honorable James W. Jackson on August 13, 1981. The next day, August 14, 1981, Judge Jackson transferred the case back to the Administrative Judge for reassignment to a visiting judge.

On September 3, 1981, the Administrative Judge assigned the case to the Honorable Richard B. McQuade of the Fulton County Court of Common Pleas.

The City of Willoughby Hills filed a Motion for Summary Judgment based upon two grounds: first, no justiciable claim for relief had been stated in the Complaint, and secondly, that no damages had been sustained by Petitioner.

The Petitioner filed a document styled "Notice to the Court" stating his objections to the City's Motion for Summary Judgment. No documentation within the ambit of Ohio Civil Rule 56, *Summary Judgment,* was presented.

The trial court rendered judgment on behalf of the City of Willoughby Hills on January 27, 1982. A Notice of Appeal to the Court of Appeals was filed thereafter.

Petitioner raised only one issue in the Court of Appeals, whether the assignment by the administrative judge of the trial court to a visiting judge from another county in Ohio was in error. Petitioner claimed that as a result of a criminal indictment rendered by the Lake County Grand Jury against him while the administrative judge was the county prosecutor, the proceedings were tainted.

On August 30, 1982, the Ohio Court of Appeals wrote *inter alia* in affirming the trial court decision:

> "In his brief (Appellant Kondrat), he does not argue the legal authority for dismissal as set forth in *Mansfield v. Bristor.* Instead he argues that Judge Mitrovich, the Administrative Judge, was biased and should have had no involvement in the case. Upon the record, the only involvement of Judge Mitrovich was the assignment of Judge McQuade, the trial judge. We do not find that such activity in any way had anything

> of a prejudicial effect on the outcome of the case. The appearance of justice was not factually besmirched by Judge Mitrovich nor Judge McQuade. We can only conclude, from the record, that this argument is unsupported and borders upon the frivolous." (Opinion, p. 2)

Petitioner filed a Memorandum in Support of Jurisdiction to the Ohio Supreme Court which was opposed by Appellee. On November 17, 1982, the Ohio Supreme Court *sua sponte* dismissed the appeal because no substantial constitutional question existed within the case.

On January 3, 1983, Petitioner filed his Petition for Writ of Certiorari.

ARGUMENT

1. A MUNICIPAL CORPORATION IS IMMUNE FROM TORT LIABILITY IN THE PERFORMANCE OF A GOVERNMENTAL FUNCTION.

The trial court granted summary judgment in favor of the City of Willoughby Hills on three separate grounds: (1) the city was immune from suit, (2) no duty inured to the benefit of Petitioner, and (3) the Petitioner did not sustain damage.

The enforcement of an ordinance which establishes building conditions constitutes a governmental function. *Wooster v. Arbenz*, 116 Ohio St. 281, 284-5 (1927). Except as provided by statute, a city is immune from liability in the performance of a governmental function. *Broughton v. Cleveland*, 167 Ohio St. 29 (1957); *Haas v. Hayslip*, 51 Ohio St. 2d 135, 136 (1977). Petitioner complained that the city failed to enforce Willoughby Hills Codified Ordinance 1337.02 which prohibits the creation of a public nuisance. Petitioner further claimed that a junk yard was created on an adjoining property lessening Petitioner's property value.

The trial court and the Court of Appeals agreed that governmental immunity applied and that an Ohio Supreme Court case was dispositive of the issue. In Syllabus 3 of *Mansfield v. Bristor*, 76 Ohio St. 270 (1907), the court stated:

> 3. The power given to a municipality to prevent injury or annoyance from anything offensive or unwholesome, and to cause any nuisance to be abated, is governmental, and the municipality is not liable for damages from a private nuisance resulting from

its omission to exercise the power by the adoption of resolutions or ordinances, or for damages from such nuisance occasioned by a failure of its officers to enforce resolutions or ordinances adopted in the exercise of that power.

The enforcement or failure to enforce a municipal ordinance does not create a duty from a city to an individual citizen upon which a tort claim may be premised. Instead, the legislation is intended to benefit the public generally. *Oregon v. Ferguson*, 57 Ohio App. 2d 95 (Franklin Co. 1975); *Reckman v. Kerter*, 109 Ohio App. 81, 90 (Montgomery Co. 1959); *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 199 N.W.2d 158, 160 (Minn. 1972).

Therefore, Petitioner's Complaint failed to state a claim upon which relief could be granted because the city did not have a duty to Petitioner.

Finally, the city showed, through an affidavit, pursuant to the evidentiary requirements of Ohio Civil Rule 56, that Petitioner's property had not decreased in value as had been alleged within the Complaint. Petitioner failed to create a question of fact by contradicting the evidence presented.

Therefore the lower courts were correct in determining that the City of Willoughby Hills was without obligation to Petitioner based on the city's Motion for Summary Judgment because the city was immune from suit, it was without obligation to Petitioner and that Petitioner did not sustain damages.

2. THE CONDUCT OF AN ADMINISTRATIVE JUDGE WHO CAUSES THE ASSIGNMENT OF A CASE TO A VISITING JUDGE DOES NOT PREJUDICE THE RIGHTS OF A PARTY.

Petitioner claims that the conduct of the Administrative Judge of the Lake County Common Pleas Court, the Honorable Paul H. Mitrovich, somehow deprived him of a constitutional right. The issue of prejudice was not presented to the trial court but rather it was claimed in the Court of Appeals as the only assignment of error.

A review of the record reflects that the conduct of the Administrative Judge was in conformity with the Ohio Rules of Superintendence for Courts of Common Pleas.

Upon filing, the case was assigned for trial to the Honorable John M. Parks. C.P. Sup. R.4.

Judge Parks, by Journal Entry, transferred the case to the Administrative Judge, the Honorable Paul H. Mitrovich, for reassignment.

C.P. Sup. R.3(B) provides:

> "The Administrative Judge shall be the presiding officer of his division and shall have full responsibility for and control over the administration, docket and calendar of the division which he serves."

The only issue presented by Petitioner refers to the Administrative Judge's transfer of the case to a visiting judge. There is no claim that Judge Mitrovich ruled on any substantive matter in the case at bar. It must also be noted that no objection to the visiting judge sitting as the trial judge occurred in this case.

Although the Ohio Rules of Superintendence of the Court of Common Pleas are silent as to the procedure

in the transfer of cases, the Ohio Judicial Conference comments to the Rules of Superintendence are instructive:

> The transfer of cases from one judge to another is not specifically addressed in the rules. Transfer is to be contrasted with a judge handling some aspect of the case for another judge. Transfer means the reassignment of a case from one judge to another judge. Transfer is the *obligation* of the administrative judge as a part of his full responsibility for the control of the docket. It is a necessary implication. Transfer should be accomplished with a journal entry. pp. 6-7. (Emphasis supplied).

The Administrative Judge merely fulfilled his obligation as an administrative judge to cause the case to be heard by a neutral judge. The claimed defect now raised in this court for the first time appeared as the *only* issue presented in the Court of Appeals. Therefore, the issue now presented was waived by Petitioner's failure to consider the issue in the trial court.

For the foregoing reasons the conduct of the Administrative Judge of the Lake County Court of Common Pleas was pursuant to the Ohio Rules of Superintendence of the Court of Common Pleas. No error occurred to the detriment of the Petitioner when the case was transferred to a visiting judge who considered the merits of the case at bar.

3. AN ISSUE MAY NOT BE RAISED FOR THE FIRST TIME IN THE SUPREME COURT OF THE UNITED STATES.

Petitioner who has appeared before this court on at least two prior occasions as a *pro se* litigant in Case No. 79-83 and Case No. 79-1710, raises for the first time in this proceeding, that he could not obtain counsel to repre-

sent his interests. The absence of raising the issue in the lower courts now denies review of the issue. *Kalish v. Trans World Airlines,* 59 Ohio St. 2d 73 (1977).

However, Petitioner's Brief supplies sufficient basis for denial of his claimed deprivations. Petitioner is not indigent (p. 9, Brief of Petitioner for Writ of Certiorari).

Petitioner cites *Gideon v. Wainwright,* 327 U.S. 335 (1963) in an attempt to involve Sixth and Fourteenth Amendment considerations. A reading of the Sixth Amendment reflects that it specifically refers only to criminal cases. Justice Goldberg, when commenting upon *Gideon* in *Escobedo v. Illinois,* 378 U.S. 478 (1964) noted that the Sixth Amendment was applicable in both state and federal courts to *criminal* proceedings at trial.

In a criminal proceeding, the state is the initiating party and loss of liberty may be the outcome to the convicted criminal defendant. Only when loss of liberty is at issue must counsel be appointed. *Argersinger v. Hamlin,* 407 U.S. 25 (1972). In the case at bar, it is Plaintiff who has initiated this civil action and who has requested monetary relief. The Sixth Amendment does not apply to civil litigation where the non-indigent Plaintiff requesting counsel seeks damages.

The failure to present the issue presented to the court below, the distinguishing features of the case at bar to a criminal proceeding deny Petitioner a claim for relief.

CONCLUSION

The record does not reflect a constitutional issue which is appropriate for consideration by this court or a conflict among the federal jurisdiction as to any issue of law. The record amply reflects that Respondent was entitled to judgment. Under settled principles of appellate review, a Petitioner may not present new and different issues at each stage in the appellate process. The failure to present constitutional issues with a record to justify such consideration requires that this Writ of Certiorari be denied.

Respectfully submitted,

ABRAHAM CANTOR
BYRON AND CANTOR
36100 Euclid Avenue/Suite 330
Willoughby, Ohio 44094-4492
Telephone: (216) 951-2303
Attorney for Respondent

APPENDIX

OHIO RULES OF SUPERINTENDENCE

Rule 3

ADMINISTRATIVE JUDGE

* * * * *

(B) Powers. The administrative judge shall be the presiding officer of his division and shall have full responsibility for and control over the administration, docket and calendar of the division which he serves. He shall cause cases to be assigned to the judges within the division and shall require such reports from each judge concerning the status of assigned cases as he may require to assist him in discharging his overall responsibility for the observance of these superintendence rules and for the termination of cases in his division without undue delay.

The administrative judge shall maintain records indicating the number of pending cases which each attorney is to try. In civil cases the attorney who is to try the case shall be designated as trial attorney on all pleadings filed therein. At the time of arraignment in criminal cases, the attorney who is to try the case shall be stated in writing by such attorney.

The administrative judge shall formulate such accounting and audit procedures within his division and the office of the clerk of courts as will insure the accuracy of all reports required by these rules.

Rule 4

ASSIGNMENT SYSTEM

For the purpose of these rules, the individual assignment system is that system whereby, upon the filing in,

or transfer to, a division of the court of a civil case, or upon arraignment in a criminal case, a case is immediately assigned by lot to a judge thereof, who thus becomes primarily responsible for the determination of every issue and proceeding in the case until its termination. Under such system, all preliminary matters, including requests for continuances, must be submitted for disposition to the judge to whom the case has been assigned, or if he is unavailable to the administrative judge.

Each multi-judge general division of each court of common pleas shall adopt the individual assignment system as defined herein for the assignment of all cases to judges of the division for disposition.

OHIO RULES OF CIVIL PROCEDURE

Rule 56

SUMMARY JUDGMENT

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment

in his favor as to all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings thereon. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are

without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented

in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Amended July 1, 1976.

CODIFIED ORDINANCES OF WILLOUGHBY HILLS

1337.02 EXTERIOR PROPERTY NUISANCES DEFINED; ABATEMENT.

No owner of any premises shall maintain or permit to be maintained at or on the exterior property areas of such premises any condition which deteriorates or debases the appearance of the neighborhood; or reduces property values in the neighborhood; or adversely alters the appearance and general character of the neighborhood; or creates a fire, safety or health hazard; or which is a public nuisance; including but not limited to the following:

(a) Broken or dilapidated fences, walls or other structures.

(b) Out of use or nonusable appliances, dilapidated automobiles or automobile parts.

(c) Rugs, rags or other materials hung on lines or in other places on such premises, which materials are not being used for general household or housekeeping purposes; broken, dilapidated or unusable furniture, mattresses or other household furnishings; plastic materials, paints, miscellaneous coverings and/or any other materials including those

described in this section, placed at or on the premises in such a manner as to be patently unsightly, grotesque or offensive to the senses.

All such conditions are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedures specified in this chapter. (Ord. 1967-30. Passed 7-13-67.)

AMENDMENTS TO THE U.S. CONSTITUTION

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(Effective 1791)

Ohio Constitution Comparison

Compulsory process, Ohio Const. art. I, § 10.
Confronting witnesses, Ohio Const. art. I, § 10.
Nature of charge, Ohio Const. art. I, § 10.
Right to counsel, Ohio Const. art. I, § 10.
Right to trial by jury, Ohio Const. art. I, § 5.
Speedy and public trial by jury, Ohio Const. art. I, § 10.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Effective 1868)

Ohio Constitution Comparison

Due process, Ohio Const. art. I, § 16.
Equal protection, Ohio Const. art. I, § 2.